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No. 97-621

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

OJAVAN INVESTORS, INC., et al.,

Petitioners,

vs.

CALIFORNIA COASTAL COMMISSION, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal Second Appellate District, Division Seven

RESPONDENT CALIFORNIA COASTAL COMMISSION'S BRIEF IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED

1. Do Petitioners' 73 separate knowing and intentional violations of the California Coastal Act support the civil fines imposed by the court?

2. Are the California Coastal Act's injunctive and monetary remedies civil in nature when they are designed and intended to protect the public's interest in the state's coast, obtain compliance with the Act and remediate environmental degradation within the coastal zone?

3. Do enforcement actions brought pursuant to the California Coastal Act sound in equity such that there is no right to a trial by jury?

4. By virtue of the final decision of *Ojavan Investors, Inc. v. California Coastal Com.*, 26 Cal.App.4th 516, 32 Cal.Rptr.2d 103 (1994), *cert. denied*, 513 U.S. 1148 (1995), are Petitioners barred by the *res judicata* doctrine from renewing their challenge to the underlying coastal development permits?

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RESPONDENT CALIFORNIA COASTAL COMMISSION'S BRIEF IN OPPOSITION TO PETITION

Respondent California Coastal Commission ("Coastal Commission")[1] respectfully requests this Court to deny the petition for writ of certiorari seeking review of the opinion of the California Court of Appeal.

RELATED PETITION

Simultaneously with the instant petition, Petitioners filed a petition for writ of certiorari in related litigation. (*Peter D. Bogart, et al. v. California Coastal Com.*, Supreme Court Docket No. 97-622.) The petitions are related because they both arise from the same factual circumstances.

REASONS FOR DENYING THE WRIT

The writ should be denied because: (1) the state court has not decided an important federal question in any way that conflicts with the decision of another state court of last resort or of a United States court of appeals; (2) the

[1] As noted at page ii of Petitioners' brief, the Coastal Commission was the respondent, appellee and cross-complainant below. The individual Commissioners, in-house counsel, and enforcement staff, all of whom are delineated in Petitioners' caption, were initially sued by Petitioners. They were dismissed by the trial court and Petitioners eventually abandoned that portion of the litigation. Accordingly, only the Coastal Commission appears as respondent before this Court.

state court has not decided any important federal question that has not been, but should be, decided by this Court; and (3) the state court has not decided an important federal question in any way that conflicts with relevant decisions of this Court. (Sup. Ct. R. 10, subd. (b), (c).)

First, the Coastal Act fines imposed by the court are proportional to Petitioners' 73 separate knowing and intentional Coastal Act violations. During trial, all parties *stipulated* – without reservation – that the criteria for determining the amount of civil fines would be confined to five specific factors now codified in the California Coastal Act of 1976, Public Resources Code sections 30000 *et seq.* ("Coastal Act"). In applying the criteria, the trial court explicitly considered the mitigating factors, as well as those facts that established the seriousness of the violations. Thus, the state court correctly noted that the aggregate "amount is large only because [Petitioners] violated the Coastal Act 73 times and refused to remedy their violations." (Opinion of the state court reproduced in the Petition, Appendix A ("Pet., App. A") at p. 41a.)[2]

Second, the state court properly held that Coastal Act injunctive and monetary remedies do not fall within this Court's civil forfeiture line of cases. That body of case law arises under the Double Jeopardy Clause where a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not

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[2] All citations to the state court decision will be to the opinion as it is reproduced at Appendix A to the Petition for Writ of Certiorari.

fairly be characterized as remedial, but only as a deterrent or retribution. The remedies in this case are civil in nature because they were designed and intended to protect the public's interest in California's coast, obtain compliance with the Coastal Act and remediate environmental degradation in the coastal zone. Consequently, Petitioners' forfeiture theory does not apply.

Third, the state court properly held that Petitioners were not entitled to a trial by jury. There is no right to a jury trial in an action sounding in equity. Where, as here, the civil fines are tied to the injunction in that the same alleged misconduct is the basis for all the types of relief sought, the issues are equitable in nature. Moreover, the Seventh Amendment jury trial guarantee has not been incorporated in the Due Process Clause of the Fourteenth Amendment and, therefore, is not binding on the states. Thus, with respect to the Seventh Amendment, the states are left to regulate trials in their own courts in their own way. In civil actions brought in California, the defendant has no right to a jury trial under the Seventh Amendment.

Finally, the state court properly rejected Petitioners' renewed attacks on the underlying coastal development permits as barred by the *res judicata* doctrine. In an earlier related case, the state court determined that the permits and their conditions were enforceable and this Court denied Petitioners' subsequent petition for writ of certiorari. That determination, therefore, is final and may not be relitigated here.

STATEMENT OF THE CASE

Though the Statement of the Case is lengthy and complex, it is nonetheless necessary for a complete understanding of Petitioners' unsuccessful and frivolous six year battle against the Coastal Commission and the Commission's successful litigation under the Coastal Act.

Furthermore, many of the relevant legal and factual issues have already been determined in the Coastal Commission's favor in the related case of *Ojavan Investors, Inc. v. California Coastal Com.*, 26 Cal.App.4th 516, 32 Cal.Rptr.2d 103 (1994), *cert. denied*, 513 U.S. 1148 (1995) (hereinafter "*Ojavan I*"). Thus, the state court held that "[s]ince *Ojavan I* is a final decision on the merits and concerned the same permits, deed restrictions and issue of whether the Commission's cease-and-desist order is enforceable against Ojavan Investors, the res judicata doctrine prohibits relitigation of matters already determined in *Ojavan I*." (Pet., App. A at p. 12a.) Petitioners do not challenge this holding in their petition for review. Accordingly, where appropriate, the Coastal Commission will base factual references on the appellate record and/or the related *Ojavan I* decision.

A. The Underlying Facts

The California Legislature has declared that the California Coastal Act "shall be liberally construed to accomplish its purposes and objectives." (Pub. Resources Code § 30009.) One such objective is to " '[p]rotect, maintain, and, where feasible, enhance and restore the overall quality of the coastal zone environment and its natural and

artificial resources.' " (*Ojavan I, supra,* 26 Cal.App.4th at 520, quoting Pub. Resources Code § 30001.5, subd. (a).)

To satisfy this objective, the Coastal Commission established the Transfer of Development Credits Program ("TDC Program") whereby new subdivisions and development projects in Malibu and the Santa Monica Mountains are approved "on the condition that the project proponents arrange to extinguish, either by direct purchase or through involvement in government programs, the development capacity of other lots." (*Ojavan I, supra,* 26 Cal.App.4th at 520.) "The TDC Program thus conditions the issuance of coastal development permits on the extinguishment of development rights as to other building sites in the coastal zone, either by offering to dedicate a scenic easement or by filing declarations of restrictions, thereby waiving development rights and unifying separate lots into one parcel." (*Ibid.*) This petition arises from the Coastal Commission's enforcement of two coastal development permits issued under the TDC Program.

On December 19, 1979, and May 10, 1990, the Coastal Commission issued coastal development permits to David Leanse and Larry Thorne ("permits"), respectively, for condominium and housing developments in the Malibu area within the coastal zone. (*Ojavan I, supra,* 26 Cal.App.4th at 521.) Messrs. Leanse and Thorne are not and have never been parties to any litigation between Petitioners and the Coastal Commission. (*Id.* at 523.) These two projects were not related to each other, but the Coastal Commission found that both projects created risks of adverse cumulative environmental impacts on coastal resources. (*Id.* at 521.) To mitigate such impacts, the Coastal Commission conditioned permit approval on

the applicants' participation in the TDC Program. (*Ibid.*) Accordingly, as a condition precedent to issuance of the permits, the applicants agreed that they would provide evidence to the Coastal Commission that development rights for residential use had been extinguished on a specified number of building sites in the coastal zone near the proposed projects. (*Ibid.*)

The permit applicants fulfilled the TDC condition by purchasing, in the private market place, the right to have other, unrelated landowners record documents restricting development on privately owned lots. (*Ojavan I, supra,* 26 Cal.App.4th at 521.) One restriction, known as an Offer To Dedicate a Scenic Easement, extinguished the building rights on the subject lots by transferring such rights to the permit applicants' own properties. (*Ibid.*) The other restriction was embodied in four Declarations of Restrictions which "recombine[d] and unif[ied] the Subject lands into a single parcel for all purposes . . . including but not limited to sale, conveyance, development, taxation or encumbrance [so that] the proposed development is in conformity with the [Coastal] Act. . . . " (*Ibid.*) These declarations expressly state that any violation of the restrictions "shall render the landowners or their successors liable pursuant to the provisions of [the Coastal Act]." (*Id.* at 522.) Pursuant to their respective agreements with the permit applicants, Petitioners' predecessors in interest recorded the Declarations of Restrictions on their lots between July 1981 and June 1990. (*Id.* at 521.) The result was that the 77 former individual lots were recombined into 2 larger lots. (*Id.* at 522.) Thus, either or both of the 2 newly recombined lots could be sold, but the former

77 lots could not be sold-off individually. (*Ibid.*) Ultimately, the deed restricted lots arising from the separate Leanse and Thorne permit transactions came to be held by a common owner, Dan Bochner. (*Ibid.*)

In February 1991, without the knowledge or approval of the Coastal Commission and in violation of the permits' restrictions (*Ojavan I, supra,* 26 Cal.App.4th at 522, 525), Petitioners purchased a total of 54 of the 77 deed restricted lots from Mr. Bochner (Clerk's Transcript ("CT") 2234-2243, 2671-2672). Between April 2, 1991, and January 26, 1992, Petitioners then proceeded to sell a total of 19 deed restricted lots to third parties. (CT 2672, 2244-2261.) In the auction brochure, Petitioners stated:

> "Unbelievably cheap, due to restrictions on development. Economists tell us the government is broke, and only development money can fill the bureaucrats' maws. They'll *have* to develop!" (*Ojavan I, supra,* 26 Cal.App.4th at 522, emphasis original.)

Based on this representation, as well as assurances from Petitioners, the third party purchasers were led to believe that they could build on the lots despite the previously-recorded restrictions on development. (Reporter's Transcript ("RT") 275, 322-324, 344.) After being alerted to these illegal purchases and sales of the deed restricted lots, Coastal Commission enforcement staff attempted to convince Petitioners to halt their illegal activities and voluntarily correct their violations of the Coastal Act. (CT 23-25; *Ojavan I, supra,* 26 Cal.App.4th at 522.) When these efforts proved unsuccessful because Petitioners were intractable, the Coastal Commission was

forced to issue cease and desist orders to prevent a further breach of the Declarations of Restrictions. (*Ibid.*)

B. Litigation History

In July and October of 1992, Petitioners filed two complaints for damages and one petition for administrative mandamus in the Los Angeles County Superior Court challenging the permits' deed restrictions, and the Coastal Commission's issuance of cease and desist orders thereon, alleging numerous constitutional and tort claims. (CT 1-22; *Ojavan I, supra,* 26 Cal.App.4th at 523.) The crux of their allegations was that the Declarations of Restrictions were invalid and could not be enforced. (*Ibid.*) On the Coastal Commission's motions, the trial court dismissed all three of Petitioners' actions holding that: (1) the suits were barred by the Coastal Act's 60-day statute of limitations; and (2) the suits were barred by the doctrine of waiver. (CT 797-800; *Ojavan I, supra,* at 523.)

Petitioners appealed the two dismissals in the related actions, but the Court of Appeal unanimously affirmed the trial court's judgments of dismissal. (*Ojavan I, supra,* 26 Cal.App.4th 516.) Finally, this Court denied Petitioners' petition for a writ of certiorari. (*Ojavan I, supra,* 513 U.S. 1148.)

In response to the first of the three suits filed by Petitioners, the Coastal Commission filed a cross-complaint against Petitioners, Mr. Bochner, the third party purchasers and others, for violations of the Coastal Act seeking both injunctive and civil fines. (CT 170-188.) Specifically, the Coastal Commission prayed for a permanent injunction that would require Petitioners to "undo

each violation of the terms and conditions" of the permits and for civil fines "for each individual violation of each [deed restriction] and any other violation of the Coastal Act." (CT 182, 186.) The Coastal Commission also alleged that the corporate Petitioners were "sham" and that they were "the alter egos, instrumentalities, conduits of, and mere shells for, certain individuals including, but not limited to, [Petitioner] PETER D. BOGART. . . . " (CT 173-174.)

Between July 8, 1993 and July 26, 1994, the Coastal Commission negotiated and obtained stipulated judgments with Mr. Bochner and all of the third party purchasers. (CT 892-895, 901-904, 910-913, 1210-1213, 1232-1235, 1242-1245, 1255-1258, 1379-1382, 1388-1391, 1397-1400, 1406-1409, 1479-1482, 1593-1596, 3665-3671.) With respect to the settlements with the third party purchasers, the Coastal Commission waived all civil fines and, in return, all third party cross-defendants agreed to cooperate with the Commission in obtaining injunctive relief that would undo the illegal sales transactions. (CT 892-895, 901-904, 910-913, 1210-1213, 1232-1235, 1242-1245, 1255-1258, 1379-1382, 1388-1391, 1397-1400, 1406-1409, 1479-1482, 1593-1596.) The Coastal Commission did not waive civil fines as to Mr. Bochner because he was aware of the deed restrictions when he initially sold 54 of the 77 former lots to Petitioners; therefore, Mr. Bochner agreed to pay a civil fine of $10,000 and supply a letter of credit in the amount of $92,634.30 to be used to effectuate the rescission of the sales. (CT 1593-1596.) In contrast to the actions of the third party purchasers and Mr. Bochner, Petitioners did not settle despite the numerous attempts made by the Coastal Commission.

(CT 23-25; RT 154-155; *Ojavan I, supra,* 26 Cal.App.4th at 522.)

On March 3, 1994, the trial court granted the Coastal Commission's motion for issue and monetary sanctions based on Petitioners' violation of a previously-issued discovery order. (CT 2492-2494.) Specifically, despite being ordered to produce documents regarding the Coastal Commission's alter ego allegations, Petitioners refused to do so. (CT 2451-2454.) Thus, the court found that Petitioners abused the discovery process and ruled that the Coastal Commission was "relieved from producing any further evidence in support of its alter ego claim, and [Petitioners] are precluded from presenting any evidence in opposition to the Coastal Commission's alter ego claim." (CT 2493.) Specifically, the corporate Petitioners were held to be "sham corporations" and the "alter egos, instrumentalities, conduits of, and mere shells for [Petitioner] Peter D. Bogart." (CT 2493.)

The Coastal Commission litigated its cross-complaint after the corporate veil was pierced and Petitioners' three lawsuits were dismissed. A judgment in the Coastal Commission's favor was obtained in two phases. First, the Coastal Commission filed a motion for summary adjudication of the issue of Petitioners' liability under the Coastal Act. (CT 2182.) In that motion, based on the Declarations of Restrictions, grant deeds and Petitioners' admissions to their purchases and sales of the restricted lots, the Coastal Commission contended that Petitioners' 54 purchases and 19 sales of the deed restricted lots violated the Coastal Act. (CT 2200-2205.) Petitioners opposed the motion by making three arguments: (1) the

Coastal Commission had no power to enforce the Declarations of Restrictions; (2) the Coastal Commission submitted no evidence of the underlying permits; and (3) Petitioners acted in good faith. (CT 2500-2519.)

On March 23, 1994, after hearing oral arguments, the trial court granted the Coastal Commission's motion finding that "there is no triable issue as to [Petitioners'] liability under the Coastal Act," and that, accordingly, "no further proof on [Petitioners'] liability under the Coastal Act, as pled in the first through fifth causes of action, shall be required at the trial of this action. . . . " (CT 2670, 2672.) The summary adjudication order did not address the amount of civil fines or other relief specifically reserving such remedy issues for a separate trial. (CT 2673.)

On July 15, 1994, prior to trial on the remedy phase of the litigation, the Coastal Commission filed two motions in limine. (CT 3564, 3574.) One motion was for an order precluding a jury trial on the remaining issues because the Coastal Act claims are grounded in equity and, as such, both the Coastal Commission and Petitioners were not entitled to a jury trial. (CT 3564-3571.) The Coastal Commission's other in limine motion was for an order precluding Petitioners from attempting to relitigate in the remedy phase matters already determined in the Coastal Commission's favor, such as Petitioners' liability under the Coastal Act, the Coastal Commission's right to litigate this enforcement action, and the alter ego issue. (CT 3574-3587.) Petitioners opposed both motions in limine. (CT 3752-3760, 3790-3803.) The court granted both motions. (CT 3867-3869, 3872-3873.) At the same hearing, the court issued a third order denying Petitioners'

request to allow Petitioner Bogart to use trial counsel separate from that used by the corporations because, as the Coastal Commission argued, the court had previously pierced the corporate veil and, therefore, Petitioner Bogart and his corporations were to be treated as one entity. (RT 70-79.) The court, however, allowed additional counsel to associate with existing counsel to represent the corporate entities as well as Petitioner Bogart. (RT 77.)

For the remedy phase of the litigation, the matter was transferred to a different judge for a bench trial. (CT 3918.) On the first day of trial on August 11, 1994, Petitioners improperly moved for reconsideration of the prior judge's two in limine orders and order relating to Petitioners' counsel, but the trial court denied these requests for reconsideration. (CT 3917.) Petitioners also filed a petition for writ of mandate with the appellate court seeking to stay the trial until review could be had on three orders. (*See* Court file.) The Court of Appeal denied the petition. (*Ibid.*) The trial then commenced and lasted for three days with both sides calling witnesses and introducing documentary evidence. (RT 103-521.) Though Petitioners listed Petitioner Bogart as a trial witness (CT 3764), he was never called to testify (RT 515). After trial and post-trial briefing by the parties, the matter was submitted. (RT 4070; CT 4071-4160.)

On October 7, 1994, the trial court ruled on the Coastal Commission's prayer for permanent injunctive relief holding that, because the Coastal Commission had previously "prevailed on its injunctive cause of action when [the prior judge] granted its summary adjudication motion as to the First Cause of Action[,] . . . [it already] has [been] determined that appropriate permanent

injunctive relief requires each of these Cross-Defendants to comply with the terms of the Thorne and Leanse permits and to refrain from violating the permits in the future." (CT 4166-4167.) Accordingly, the court issued a permanent injunction that required Bogart and his corporations to rescind each of the illegal sales of the deed restricted lots and make monetary restitution to the third party purchasers. (CT 4166-4169.) The court ordered that such rescission and restitution should be completed within 20 days of the injunction. (CT 4169.)

On October 14, 1994, the trial court issued a tentative statement of decision regarding the imposition of civil fines. (CT 4170-4174.) The court imposed a daily civil fine of $100 for each of the 73 violations, accruing at a rate of $7300 per day until Petitioners have complied with the permanent injunction. (CT 4173-4174.) The court also imposed a one-time civil fine of $5,000 per violation. (CT 4172.) The court declined to impose an additional civil fine because, based on the language of the Coastal Act, the extra fines "are not necessary to deter further violations" of the Act. (CT 4174.) Thus, as of the date of the tentative statement of decision, the total civil fine was $9,822,800. (CT 4172-4174.)

C. The Instant Appellate Decision

On December 5, 1994, Petitioners appealed the judgment and all orders. (CT 4365-4366.) On April 17, 1997, after briefing and argument of the parties, the California Court of Appeal for the Second Appellate District,

Division Seven, affirmed the judgment and each order in their entirety. (*See* Pet., App. A.)

ARGUMENT

I.

THE COASTAL ACT FINES ARE PROPORTIONAL TO PETITIONERS' COASTAL ACT VIOLATIONS

Petitioners argue that a civil fine that is imposed on a "per violation, per day" basis violates the Eighth Amendment to the U.S. Constitution because the resultant fine is not "proportional" to the violation. During trial, all parties stipulated that the criteria for determining the amount of fines would be confined to the five factors that the Coastal Commission utilizes in analyzing the seriousness of Coastal Act violations; the California Legislature codified the criteria in the 1992 amendments to the Coastal Act. (RT 133.) In applying the five factors, the trial court explicitly considered the mitigating factors (little or no physical damage to the properties involved; no evidence of prior violations by Petitioners), as well as those facts that established the seriousness of the violations (the number of knowing and intentional illegal acts; sensitivity of the resource; cost to the state in bringing this action; Petitioners' culpability and profits made and expected to be made). (CT 4171-4172.)

In exercising its discretion, the trial court imposed a near minimum $100 per day per violation, rejecting the Coastal Commission's appraisal of Petitioners' violations which, the Commission had maintained at trial, warranted the imposition of the maximum fines available

under the Coastal Act. (CT 4171-4172.) Thus, the Court of Appeal found that the "trial court exercised its discretion in setting the amounts of the fines, rather than mechanically adopt the Commission's position." (Pet., App. A at p. 37a.) The Court also noted that the trial court's refusal to impose any additional amounts sought by the Coastal Commission "also evidences its exercise of discretion." (*Id.* at fn. 21.)

Nowhere do Petitioners explain what level of fines would, in their estimation, pass constitutional muster. Petitioners merely assert that the Coastal Commission were "seeking a maximum of $470 million. . . . " (Pet. at p. 6.) The Coastal Commission never prayed for a specific amount of fines, nor do Petitioners offer their computations to explain how they arrived at the total "maximum" fines. In any event, the trial court did not impose the maximum.

Petitioners also gloss over the fact that the trial court was dealing with numerous separate violations. As the Court of Appeal noted, the aggregate "amount is large only because Ojavan Investors violated the Coastal Act 73 times and refused to remedy their violations." (Pet., App. A at p. 41a.) Petitioners offer no rejoinder to this assessment other than to imply that their 54 purchases and 19 sales of the deed restricted lots should not have been counted as separate violations. (Pet. at p. 3 and fn. 1.) The state court rejected this argument holding that "[s]ince the number of lot transfers totaled 73, the trial court did not err in calculating the number of violations." (Pet., App. A at p. 38a.) Petitioners do not explain why the state court should have counted the violations any differently.

Petitioners also miscast the record in two other ways. First, they assert that the "Coastal Commission was not required to provide, and failed to provide, evidence as to its actual cost and damages which would justify" the final judgment. (Pet. at p. 18.) As shown above, however, the state court explicitly considered the cost to the Coastal Commission in bringing the litigation. (CT 4171-4172.) Second, Petitioners characterize enforcement under the Coastal Act as an action for damages. (Pet. at p. 20.) In doing so, Petitioners offer no authority as support for their claims, nor can they. In truth, contemporary environmental legislation such as the Coastal Act is grounded in equity because it represents a legislative declaration that acts injurious to the state's natural resources constitute a public nuisance. (*CEEED v. California Coastal Zone Conservation Com.*, 43 Cal.App.3d 306, 318, 118 Cal.Rptr. 315 (1974); *see also Leslie Salt Co. v. San Francisco Bay Conservation etc., Com.*, 153 Cal.App.3d 605, 618, 200 Cal.Rptr. 575 (1984).)

In sum, the Court of Appeal applied well-settled factors and legal principles in finding that the Coastal Act fines were proportional to Petitioners' numerous and intentional violations of state law.

II.

THE COASTAL ACT REMEDIES ARE NOT CRIMINAL IN NATURE

Petitioners wrongly rely on the civil forfeiture line of cases to argue that the fines imposed in this case are unconstitutional. (Pet. at pp. 12-13.) That body of case law arises "under the Double Jeopardy Clause [where] a

defendant who already had been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." (*United States v. Halper*, 490 U.S. 435, 448-449 (1989).)

Here, the Coastal Commission sued Petitioners only once, seeking injunctive relief and civil fines under the remedial provisions of the Coastal Act. Thus, the civil forfeiture cases are inapplicable because they involve prior criminal convictions as the basis for the forfeiture. No prior criminal convictions are present in the instant case. Thus, the Court of Appeal correctly rejected Petitioners' forfeiture analysis:

> "Since the injunctive relief was intended to protect the public's interest in California's coastal areas, the remedy was civil in nature. Consequently, Ojavan Investors' forfeiture theory does not apply. In view of the record, the trial court properly exercised its discretion in ordering Bogart to rescind the sales to third parties." (Pet., App. A at p. 35a.)

Furthermore, the fines, once paid, must be used to "carry[ ] out the provisions" of the Coastal Act and, for that reason, "shall be deposited in the Violation Remediation Account of the Coastal Conservancy Fund until appropriated." (Pub. Resources Code § 30823.) Thus, the fines are remedial and not punitive.

Accordingly, the Court of Appeal properly rejected Petitioners' attempts to paint the Coastal Act's remedial provisions as criminal in nature because they are designed and intended to protect the public's interest in

the state's coast, obtain compliance with the Act and remediate environmental degradation within the coastal zone.

III.

THERE IS NO RIGHT TO A TRIAL BY JURY BECAUSE COASTAL ACT ENFORCEMENT IS PURELY EQUITABLE

Subsequent to the liability determination, the trial court granted the Coastal Commission's motion in limine to strike Petitioners' jury demand "because the only remaining issues are those raised in the Coastal Commission's cross-complaint brought pursuant to the California Coastal Act of 1976, Public Resources Code § 30000 *et seq.*, and such claims are equitable in nature." (CT 3873.) Petitioners argued on appeal that the trial court abused its discretion in issuing this order because the "gist" of a Coastal Act enforcement action is "damages" and that, therefore, Petitioners were entitled to a jury trial on the amount of fines to be imposed. (Pet. at pp. 18-22.) The state court disagreed and affirmed the order in the unpublished portion of the opinion. (Pet., App. A at p. 30a.) The court held that "there is no right to a jury trial in an action sounding in equity [and] [w]here, as here, the civil fines are tied to the injunction in that the same alleged misconduct is the basis for all the types of relief sought, the issues are equitable in nature." (*Ibid.* citing *C & K Engineering Contractors v. Amber Steel Co.*, 23 Cal.3d 1, 9, 151 Cal.Rptr. 323 (1978), and *People v. Witzerman*, 29 Cal.App.3d 169, 176-177, 105 Cal.Rptr. 284 (1972).)

Relying on the federal Clean Water Act decision of *Tull v. United States*, 481 U.S. 412 (1987), Petitioners argue that the Seventh Amendment to the U.S. Constitution guaranteed them a right to a jury trial on the fines issue. (Pet. at pp. 20-22.) In fact, the *Tull* decision held precisely the opposite:

> "In this case, highly discretionary calculations that take into account multiple factors are necessary in order to set civil penalties under the Clean Water Act. These are the kinds of calculations traditionally performed by judges. [Citations.] We therefore hold that a determination of a civil penalty is not an essential function of a jury trial, and that the Seventh Amendment does not require a jury trial for that purpose in a civil action." (*Tull v. United States, supra*, 481 U.S. at 427.)

Petitioners' confusion over the *Tull* decision apparently springs from this Court's other holding in the same decision concerning the right to jury on the *liability* issue. This Court held that based on explicit legislative history unique to the Clean Water Act, a violator was entitled to a jury trial on the issue of liability because the Clean Water Act's "authorization of punishment to further retribution and deterrence clearly evidences that [the penalty provision] reflects more than a concern to provide equitable relief." (*Id.* at 423.) Because liability in the instant case was established by a motion for summary adjudication, and because Petitioners did not and cannot point to anything in the Coastal Act's legislative history that in any way resembles that examined in *Tull*, this holding has no application here.

In any event, the Seventh Amendment jury trial guarantee has *not* been incorporated in the Due Process Clause of the Fourteenth Amendment and, therefore, is not binding on the states. (*Palko v. Connecticut*, 302 U.S. 319, 324 (1937), overruled on other grounds in *Benton v. Maryland*, 395 U.S. 784 (1969).) Thus, with respect to the Seventh Amendment, the "States . . . are left to regulate trials in their own courts in their own way." (*Walker v. Sauvinet*, 92 U.S. 90, 92-93 (1875).) This Court continued:

> "A trial by jury in suits at common law pending in the State courts is not, therefore, a privilege or immunity of national citizenship, which the States are forbidden by the Fourteenth Amendment to abridge. A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the State courts affecting property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. [Citation.] Due Process is process due according to the law of the land." (*Walker v. Sauvinet, supra*, 92 U.S. at 93.)

In civil actions brought in California, the "defendant has no right to a jury trial under the Seventh Amendment." (*County of El Dorado v. Schneider*, 191 Cal.App.3d 1263, 1272, 237 Cal.Rptr. 51 (1987).) It is also settled in California that contemporary environmental legislation such as the Coastal Act is grounded in equity because it represents a legislative declaration that acts injurious to the state's natural resources constitute a public nuisance. (*CEEED v. California Coastal Zone Conservation Com., supra*,

43 Cal.App.3d at 318; *see also Leslie Salt Co. v. San Francisco Bay Conservation etc., Com., supra,* 153 Cal.App.3d at 618.) And, as the state court ruled here, there is no right to a jury trial in an action sounding in equity. (*C & K Engineering Contractors v. Amber Steel Co., supra,* 23 Cal.3d at 9.)

Even the other non-environmental and non-equitable case law relied on by Petitioners supports the order striking their jury demand. For example, in a case cited by Petitioners at page 12 of their petition, this Court held:

> "[C]ivil contempt sanctions, or those penalties designed to compel future compliance with a court order, are considered to be coercive and avoidable through obedience, and thus may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard. *Neither a jury trial nor proof beyond a reasonable doubt is required."* (*International Union, United Mine Workers of America v. Bagwell,* 512 U.S. 821, 827 (1994), emphasis added.)

This analysis is applicable here because, as with civil contempt sanctions, Coastal Act civil fines are designed to coerce compliance with the permit requirements of the Act, including the terms and conditions placed on any permit. For this reason, enforcement actions under the Coastal Act are not punitive, but are actions to abate public nuisances. (*CEEED v. California Coastal Zone Conservation Com., supra,* 43 Cal.App.3d at 318; *Leslie Salt Co. v. San Francisco Bay Conservation etc., Com., supra,* 153 Cal.App.3d at 618.) Furthermore, Petitioners were and are given a chance to purge the daily fine because, as the

state court noted, it is imposed "per day for each day in which such violation occurs." (Pet., App. A at p. 16a.)

Thus, if Petitioners had agreed to rescind their illegal purchases and sales of the deed restricted lots earlier in this litigation, they could have unilaterally and dramatically limited their exposure. Indeed, as demonstrated by Petitioners' related petition writ of certiorari filed concurrently with the instant petition, even in the face of mounting daily fines and three civil contempt citations, Petitioners have steadfastly refused to comply with the unbonded and currently enforceable injunction, thus preventing reimbursement to the defrauded third party purchasers who are still holding deed restricted properties. (*Bogart v. California Coastal Com.*, Sup. Ct. Docket No. 97-622.) The related petition also shows that Petitioner Bogart is currently a fugitive from justice with a bench warrant for his arrest outstanding. (*Ibid.*) This obdurate and illegal behavior cannot be laid at the Coastal Commission's feet.

Similarly, daily fines could have been suspended by bonding the judgment pending appeal. The key to stopping fines has always been in Petitioners' hands. Petitioners, however, would rather blame the Coastal Commission for its successful enforcement of the law rather than take responsibility for their own illegal and fraudulent actions.

IV.

PETITIONERS ARE BARRED BY THE *RES JUDICATA* DOCTRINE FROM RENEWING, AT THIS LATE DATE, THEIR CHALLENGE TO THE UNDERLYING COASTAL DEVELOPMENT PERMITS

Petitioners cite the concurring opinion in *Suitum v. Tahoe Regional Planning Agency*, ___ U.S. ___, 117 S.Ct. 1659, 137 L.Ed.2d 980 (1997), for the proposition that the TDC program, similar to that used by the Coastal Commission, "was recently soundly [sic] criticized by Justices Scalia, O'Connor and Thomas. . . . " (Pet. at pp. 4-5, fn. 2.)[3] Setting aside Petitioners' characterization of the concurring opinion, Petitioners are indirectly attempting to re-open the validity of the coastal development permits. The California Court of Appeal, however, has unequivocally and *finally* rejected Petitioners' attempts to challenge the permits' TDC conditions:

> "We . . . hold that the time to challenge coastal development permits issued pursuant to the TDC Program is within the statutory 60-day period after issuance of the permits (Pub. Resources Code, § 30801), not when a party or a successor in interest elects to violate declarations of restrictions imposed pursuant to the permits, and a cease and desist order ensues." (*Ojavan I, supra*, 26 Cal.App.4th at 525.)

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[3] In their "Question Presented for Review," Petitioners assert that the Fifth Amendment is implicated in this action. (Pet. at p. i.) Petitioners, however, never brief the Fifth Amendment in the body of their petition. The Coastal Commission, therefore, can only assume that Petitioner's discussion of the *Suitum* decision constitutes their attempt to raise the Fifth Amendment.

This Court subsequently denied Petitioners' petition for writ of certiorari. (*Ojavan I, supra,* 513 U.S. 1148.) Accordingly, the state court properly rejected Petitioners' renewed attacks on the TDC conditions as barred by the *res judicata* doctrine. (Pet., App. A at p. 12a, citing *Goddard v. Security Title Ins. & Guar. Co.,* 14 Cal.2d 47, 52 (1939).)

CONCLUSION

The petition for writ of certiorari should be denied for the above reasons.

DATED: November 4, 1997.

Respectfully submitted,

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